

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID TIFFANY,

Petitioner,

Case No. 3:13-cv-00682-MMD-VPC

ORDER

v.

ROBERT LeGRAND, et al.,

Respondents.

This is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on petitioner's motions for the appointment of counsel (dkt. nos. 5 & 8) and respondents' motion to dismiss (dkt. no. 12).

I. PROCEDURAL HISTORY

Petitioner was convicted, pursuant to a jury trial, of two counts of lewdness with a child under the age of 14, eight counts of sexual assault with a minor under the age of 14, three counts of solicitation of a minor, and five counts of child abuse and neglect. (Exh. 92.¹) Petitioner was sentenced to ten (10) life sentences with the possibility of parole after twenty (20) years, and eight (8) definite terms, all running concurrently. *Id.* Petitioner appealed his conviction. (Exh. 100.) Through appellate counsel, petitioner filed his opening brief on June 26, 2008. (Exh. 130.) The Nevada Supreme Court rejected petitioner's claims and affirmed petitioner's convictions in an order filed April

¹The exhibits referenced in this order are found in the Court's record at dkt. nos. 13-23.

1 13, 2010. (Exh. 145.) Petitioner filed a motion for rehearing, which was denied by order
 2 filed June 23, 2010. (Exh. 148.) Remittitur issued October 18, 2010. (Exh. 154.)

3 While his direct appeal was pending, petitioner filed a federal habeas petition in
 4 this Court under Case No. 3:08-cv-00539-LRH-RAM. The action was dismissed without
 5 prejudice because petitioner had not exhausted his claims in state court. (Dkt. no. 15 in
 6 Case No. 3:08-cv-00539-LRH-RAM.)

7 Petitioner filed a *pro per* post-conviction habeas petition in the state district court
 8 on November 12, 2010. (Exh. 158.) The petition was 320 pages in length. (*Id.*) By order
 9 filed February 16, 2011, the state district court dismissed the petition without prejudice
 10 on the basis that the petition was too lengthy. (Exh. 176.) Petitioner appealed. (Exh.
 11 177.) On April 11, 2011, the Nevada Supreme Court reversed and remanded the state
 12 district court's denial of the petition based on its length. (Exh. 201.) The Nevada
 13 Supreme Court remanded the case to the state district court for consideration of the
 14 claims raised in the post-conviction habeas petition. (*Id.*)

15 On remand, the state district court appointed counsel to represent petitioner in
 16 his post-conviction proceedings. (Exh. 213.) On November 22, 2011, petitioner's
 17 counsel filed a supplemental memorandum in support of the post-conviction habeas
 18 petition. (Exh. 216.) Following an evidentiary hearing, by order filed July 12, 2012, the
 19 state district court denied the post-conviction habeas petition. (Exh. 233.) Petitioner
 20 appealed from the denial of his post-conviction petition. (Exh. 237.) Petitioner's opening
 21 brief on appeal was filed on January 28, 2013. (Exh. 245.) On September 18, 2013, the
 22 Nevada Supreme Court affirmed the denial of the post-conviction habeas petition. (Exh.
 23 267.) Remittitur issued on December 5, 2013. (Exh. 270.)

24 Approximately two years before his state habeas proceedings concluded,
 25 petitioner filed another federal habeas petition in this Court, under Case No. 3:11-cv-
 26 00806-LRH-WGC. The federal petition was dismissed without prejudice for failure to
 27 exhaust his state court remedies. (Dkt. no. 5, in Case No. 3:11-cv-00806-LRH-WGC.)

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1 On February 22, 2013, acting in *pro per*, petitioner filed a second state post-
2 conviction habeas petition raising a single claim that trial counsel was ineffective for
3 failing to negotiate a plea bargain. (Exh. 247.) By order filed May 31, 2013, the state
4 district court denied petitioner's second post-conviction habeas petition. (Exh. 257.)
5 Petitioner appealed. (Exh. 259.) On September 18, 2013, the Nevada Supreme Court
6 affirmed the dismissal of the petition, finding the petition procedurally defaulted. (Exh.
7 265.) Remittitur issued on October 15, 2013. (Exh. 268.)

8 Petitioner dispatched his third federal habeas petition on November 25, 2013,
9 which was filed in the instant case. (Dkt. no. 2, at page 1, item 5.) The petition contains
10 28 grounds for relief. (Dkt. nos. 2 & 2-1.) Respondents have filed a motion to dismiss
11 the petition because it contains unexhausted claims. (Dkt. no. 12.) Petitioner filed an
12 opposition to the motion to dismiss. (Dkt. no. 27.) Respondents have filed a reply to the
13 opposition. (Dkt. no. 28.) Additionally, petitioner has filed two motions for the
14 appointment of counsel. (Dkt. nos. 5 & 8.) The Court now addresses all pending
15 motions in this case.

16 **II. DISCUSSION**

17 **A. Petitioner's Motions for Appointment of Counsel**

18 Petitioner has filed two motions seeking the appointment of counsel. (Dkt. nos. 5
19 & 8.) Pursuant to 18 U.S.C. § 3006(a)(2)(B), the district court has discretion to appoint
20 counsel when it determines that the "interests of justice" require representation. There is
21 no constitutional right to appointed counsel for a federal habeas corpus proceeding.
22 *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428
23 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney v.*
24 *Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor*
25 *v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). The petition
26 on file in this action is well-written and sufficiently clear in presenting the issues that
27 petitioner wishes to bring. The issues in this case are not complex. Counsel is not
28 justified in this instance. The motions for appointment of counsel are denied.

1 **B. Respondents' Motion to Dismiss**

2 Respondents argue that the federal habeas petition contains unexhausted
3 grounds. Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust
4 state court remedies on a claim before presenting that claim to the federal courts. To
5 satisfy the exhaustion requirement, the claim must have been fairly presented to the
6 state courts completely through to the highest court available, in this case, the Nevada
7 Supreme Court. See, e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en
8 banc); *Yang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the
9 petitioner must refer to the specific federal constitutional guarantee and must also state
10 the facts that entitle the petitioner to relief on the federal constitutional claim. *Shumway*
11 *v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). Fair presentation requires that the petitioner
12 present the state courts with both the operative facts and the federal legal theory upon
13 which the claim is based. See, e.g. *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir.
14 2005). The exhaustion requirement ensures that the state courts, as a matter of federal-
15 state comity, will have the first opportunity to pass upon and correct alleged violations of
16 federal constitutional guarantees. See *Coleman v. Thompson*, 501 U.S. 722, 731
17 (1991).

18 In this case, petitioner's federal habeas petition is almost identical to his *pro per*
19 post-conviction habeas petition filed in state court on November 23, 2010. (Compare
20 dkt. no. 2 with Exh. 158.) All grounds raised in the federal habeas petition were raised in
21 petitioner's *pro per* state habeas petition. (*Id.*) In the state district court, on remand from
22 the Nevada Supreme Court, petitioner was granted counsel, who filed a supplemental
23 memorandum in support of the petition. (Exh. 216.) After the petition was denied,
24 petitioner's appointed counsel selected only those claims that he believed were
25 appropriate for appeal. (Exh. 245.) *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)
26 ("Experienced advocates since time beyond memory have emphasized the importance
27 of winnowing out weaker arguments on appeal and focusing on one central issue if
28 possible, or at most on a few key issues."). As such, the opening brief on appeal from

1 the denial of the state habeas petition contained fewer claims than the petition filed in
2 state district court contained. (*Compare* Exh. 158 *with* Exh. 245.) Only those claims that
3 were presented to the Nevada Supreme Court on appeal were exhausted. See *Castillo*
4 *v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005). On review of the opening brief on
5 direct appeal (Exh. 130) and the opening brief on appeal from the denial of the state
6 habeas petition (Exh. 245), certain claims in the federal habeas petition, as discussed
7 below, were presented to the Nevada Supreme Court and are thus exhausted.

8 The claim in Ground 1 that the justice court's refusal to reduce the bail amount
9 violated due process was presented to the Nevada Supreme Court in the opening brief
10 on direct appeal. (Dkt. no. 2 at 47-52; Exh. 130 at 18-24.) The claim is therefore
11 exhausted.

12 The claim in Ground 5 that petitioner's right to a speedy trial was violated was
13 presented to the Nevada Supreme Court on direct appeal. (Dkt. no. 2 at 75-80; Exh.
14 130 at 24-30.) The speedy trial claim is therefore exhausted. However, to the extent that
15 Ground 5 also includes a claim of ineffective assistance of counsel, that claim is
16 unexhausted.

17 The claim in Ground 8 that there was insufficient evidence to support his
18 convictions for sexual assault, child abuse, and solicitation was presented to the
19 Nevada Supreme Court on direct appeal. (Dkt. no. 2 at 93-102; Exh. 130 at 52-58.) The
20 insufficiency of the evidence claim is therefore exhausted. However, to the extent that
21 Ground 8 includes a claim of ineffective assistance of counsel, that claim is not
22 exhausted.

23 The claim in Ground 9 that trial counsel was ineffective for failing to move to
24 sever the counts of child abuse and neglect from the other charges was presented to
25 the Nevada Supreme Court on appeal from the denial of petitioner's state habeas
26 petition and is therefore exhausted. (Dkt. no. 2 at 103-09; Exh. 245, at p. 36 (stating
27 only that counsel failed to file a motion to sever the marijuana charges despite
28 petitioner's request and the failure was "prejudicial").) The Nevada Supreme Court

1 denied the claim as conclusory. (Exh. 267 at 4-5.) To the extent that petitioner offers
2 new facts in support of this claim or has altered it by alleging that the solicitation counts
3 should have been severed (dkt. no. 2 at 103-09), these are new claims that are
4 unexhausted.

5 The claim in Ground 18 that trial counsel was ineffective for failing to obtain an
6 independent psychological evaluation of the victim was presented to the Nevada
7 Supreme Court on appeal from the denial of petitioner's state habeas petition and is
8 therefore exhausted. (Dkt. no. 2-1 at 20-26; Exh. 245 at 32-35.) The related claim in
9 Ground 18 that the trial court erred by denying the motion for a psychological evaluation
10 was presented to the Nevada Supreme Court on direct appeal and is therefore
11 exhausted. (Dkt. no. 2-1 at 20-26; Exh. 130 at 43-52.)

12 The claim in Ground 21 that the trial court erred in denying a pretrial motion for
13 an investigator was presented to the Nevada Supreme Court on direct appeal and is
14 therefore exhausted. (Dkt. no. 2-1 at 38-42; Exh. 130 at 15-18.) The claim in Ground 24
15 that the Nevada Supreme Court erred by denying this claim (dkt. no. 2-1, at pp. 52-58)
16 is redundant in light of the fact that the AEDPA review of Ground 21 will address
17 whether the Nevada Supreme Court's resolution of the claim was reasonable. 28 U.S.C.
18 § 2254(d).

19 In Ground 27, petitioner asserts a claim of cumulative error. (Dkt. no. 2-1 at 68-
20 74.) In his opening brief on appeal from the denial of his state habeas petition, petitioner
21 sought only the cumulative consideration of errors that were alleged during that appeal.
22 (Exh. 245 at 42-43.) Petitioner's claim of cumulative error in the federal petition is much
23 broader. (Dkt. no. 2-1 at 68-74.) Only the portion of Ground 27 that alleges cumulative
24 error within the scope of petitioner's opening brief on appeal from the denial of the state
25 habeas petition is exhausted. All other claims of cumulative error are unexhausted.

26 In his opposition, petitioner argues that he exhausted all claims in his federal
27 habeas petition by presenting the claims in his state habeas petition filed in the state
28 district court. (Dkt. no. 27 at 3-4.) Only those issues "within the four corners" of

1 petitioner's state appellate briefing were properly presented to the Nevada Supreme
2 Court for exhaustion purposes. *Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir.
3 2005). Petitioner did not present the Nevada Supreme Court with the majority of the
4 claims asserted in his federal habeas petition. The Court has outlined, *supra*, those
5 claims in the federal habeas petition that were properly exhausted by their presentation
6 to the Nevada Supreme Court. The following claims in the federal habeas petition are
7 unexhausted, as they were not presented to the Nevada Supreme Court: Grounds 2, 3,
8 and 4; the ineffective assistance of counsel portion of Ground 5; Grounds 6 and 7; the
9 ineffective assistance of counsel portion of Ground 8; portions of Ground 9; Grounds 10,
10 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26; portions of Ground 27; and Ground
11 28.

12 **III. PETITIONER'S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

13 A federal court may not entertain a habeas petition unless the petitioner has
14 exhausted available and adequate state court remedies with respect to all claims in the
15 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition contains both
16 exhausted and unexhausted claims. *Id.* In the instant case, the Court finds that the
17 following claims in the federal habeas petition are properly exhausted: (1) the claim in
18 Ground 1 that the justice court's refusal to reduce the bail amount violated due process;
19 (2) the claim in Ground 5 that petitioner's right to a speedy trial was violated; (3) the
20 claim in Ground 8 that there was insufficient evidence to support his convictions for
21 sexual assault, child abuse, and solicitation; (4) the claim in Ground 9 that trial counsel
22 was ineffective for failing to move to sever the counts of child abuse and neglect from
23 the other charges; (5) the claim in Ground 18 that trial counsel was ineffective for failing
24 to obtain an independent psychological evaluation of the victim, and the related claim in
25 Ground 18 that the trial court erred by denying the motion for a psychological
26 evaluation; (6) the claim in Ground 21 that the trial court erred in denying a pretrial
27 motion for an investigator; and (7) the portion of Ground 27 that alleges cumulative error
28 within the scope of petitioner's opening brief on appeal from the denial of the state

1 habeas petition. The following claims in the federal habeas petition are unexhausted:
 2 Grounds 2, 3 and 4; the ineffective assistance of counsel portion of Ground 5; Grounds
 3 6 and 7; the ineffective assistance of counsel portion of Ground 8; portions of Ground 9;
 4 Grounds 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26; portions of Ground
 5 27; and Ground 28. Because the Court finds that the petition is a "mixed petition,"
 6 containing both exhausted and unexhausted claims, petitioner has these options:

- 7 1. He may submit a sworn declaration voluntarily abandoning the
 8 unexhausted claims in his federal habeas petition, and proceed
 only on the exhausted claims;
- 9 2. He may return to state court to exhaust his unexhausted claims, in
 10 which case his federal habeas petition will be denied without
 prejudice; or
- 11 3. He may file a motion asking this court to stay and abey his
 12 exhausted federal habeas claims while he returns to state court to
 exhaust his unexhausted claims.

13 See *Rose v. Lundy*, 455 U.S. 509; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v.*
 14 *Small*, 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).
 15 Petitioner's failure to choose any of the three options listed above, or seek other
 16 appropriate relief from this Court, will result in his federal habeas petition being
 17 dismissed. Petitioner is advised to familiarize himself with the limitations periods for
 18 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations
 19 periods may have a direct and substantial effect on whatever choice he makes
 20 regarding his petition.

21 **IV. CONCLUSION**

22 It is therefore ordered that petitioner's motions for the appointment of counsel
 23 (dkt. nos. 5 & 8) are denied.

24 It is further ordered that respondents' motion to dismiss (dkt. no. 12) is granted,
 25 as follows:

- 26 1. The following claims in the federal habeas petition are exhausted:
 27 (1) the claim in Ground 1 that the justice court's refusal to reduce the bail amount
 28 violated due process; (2) the claim in Ground 5 that petitioner's right to a speedy trial

1 was violated; (3) the claim in Ground 8 that there was insufficient evidence to support
2 his convictions for sexual assault, child abuse, and solicitation; (4) the claim in Ground 9
3 that trial counsel was ineffective for failing to move to sever the counts of child abuse
4 and neglect from the other charges; (5) the claim in Ground 18 that trial counsel was
5 ineffective for failing to obtain an independent psychological evaluation of the victim,
6 and the related claim in Ground 18 that the trial court erred by denying the motion for a
7 psychological evaluation; (6) the claim in Ground 21 that the trial court erred in denying
8 a pretrial motion for an investigator; and (7) the portion of Ground 27 that alleges
9 cumulative error within the scope of petitioner's opening brief on appeal from the denial
10 of the state habeas petition.

11 2. The following claims in the federal habeas petition are
12 unexhausted: Grounds 2, 3 and 4; the ineffective assistance of counsel portion of
13 Ground 5; Grounds 6 and 7; the ineffective assistance of counsel portion of Ground 8;
14 portions of Ground 9; Grounds 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 25 and 26;
15 portions of Ground 27; and Ground 28.

16 It is further ordered that petitioner shall have thirty (30) days to either: (1) inform
17 this Court in a sworn declaration that he wishes to formally and forever abandon the
18 unexhausted grounds for relief in his federal habeas petition and proceed on the
19 exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to
20 dismiss this petition without prejudice in order to return to state court to exhaust his
21 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to
22 hold his exhausted claims in abeyance while he returns to state court to exhaust his
23 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or
24 seek other appropriate relief, respondents may respond to such motion as provided in
25 Local Rule 7-2.

26 It is further ordered that if petitioner elects to abandon his unexhausted grounds,
27 respondents shall have thirty (30) days from the date petitioner serves his declaration of
28 abandonment in which to file an answer to petitioner's remaining grounds for relief. The

1 answer shall contain all substantive and procedural arguments as to all surviving
2 grounds of the petition, and shall comply with Rule 5 of the Rules Governing
3 Proceedings in the United States District Courts under 28 U.S.C. §2254.

4 It is further ordered that petitioner shall have thirty (30) days following service of
5 respondents' answer in which to file a reply.

6 It is further ordered that if petitioner fails to respond to this order within the time
7 permitted, this case may be dismissed.

8 DATED THIS 17th day of February 2015.

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11 MIRANDA M. DU
12 UNITED STATES DISTRICT JUDGE
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